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As Time Goes By: New Questions About the Statute of Limitations for Rule 10b-5

Cover Page Footnote

I am grateful to Marc Arkin and Michael Malloy for their comments on earlier drafts and to Jackie Snider, Fordham Law School Class of 1993, for her research assistance.

AS TIME GOES BY:* NEW QUESTIONS ABOUT THE STATUTE OF LIMITATIONS FOR RULE 10b-5

JILL E. FISCH**

In this Article, Professor Fisch examines the history and legacy of Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilberston, the controversial 1991 Supreme Court decision that established a federal statute of limitations for private causes of action brought under Rule 10b-5. In Part I, Professor Fisch reviews the history of the 10b-5 statute of limitations prior to Lampf. Part II then analyzes both the issues resolved and questions raised by Lampf. Part III traces the congressional reaction to Lampf that culminated in the addition of section 27A to the Securities Act of 1934. In Part IV, Professor Fisch concludes by analyzing the legitimacy of section 27A and the many issues left unanswered by this statutory response to Lampf.

THERE are dozens of Supreme Court decisions and perhaps thousands of lower court opinions addressing problems of statutory interpretation that arise in connection with private rights of action under section 10(b)¹ of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5² of the Securities and Exchange Commission ("SEC"). The quantity of judicial ink addressed to the problem is not surprising considering that, although courts have implied a private right of action, neither the 1934 Act nor Rule 10b-5 expressly provides such a claim. Accordingly, there is an absence of legislative guidance as to the appropriate parameters of the cause of action. Unlike most statutory claims in which Congress delineates the nature of the claim, those who have standing to pursue it, the proper measure of damages, and the period during which claims must be filed, in the case of federal securities fraud, these questions must be answered by the courts.

The courts claim, as of course they must, that providing these answers does not amount to lawmaking. They explain that they are simply divining congressional intent. The acknowledged "awkward task" of "imagining" congressional intent with respect to "a cause of action it really

* Along with marking 50 years of Rule 10b-5, we are also celebrating 50 years of the film classic *Casablanca*. See Aljcan Harmetz, . . . *And His Movie for All Seasons*, N.Y. Times, Nov. 29, 1992, § H, at 11 (reporting that *Casablanca* opened in New York on Thanksgiving, 1942).

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1. 15 U.S.C. § 78(b) (1988 & Supp. II 1990).

2. 17 C.F.R. § 240.10b-5 (1992).

never knew existed"³ has created a number of judicial principles with respect to securities fraud that have little origin in the text or history of the statute.⁴

The recent struggle to determine the appropriate statute of limitations under Rule 10b-5 is an example of this process. On June 20, 1991, the U.S. Supreme Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,⁵ in which it held for the first time that claims under Rule 10b-5 were subject to a uniform federal statute of limitations.⁶ Six months after *Lampf*, Congress responded to the decision with its first legislation addressed to private civil securities fraud claims.⁷ The response was an amendment to the 1934 Act that, although it did not change the *Lampf* statute of limitations, precluded its application to pending litigation.⁸

Although the Court's adoption of a uniform federal statute of limitations after forty years of lower court practice to the contrary smacks of judicial legislation, the *Lampf* decision was a welcome end to the uncertainty and forum-shopping created by the prior practice of borrowing from state law. Moreover the ensuing congressional reaction to the decision presents an unusual separation of powers question: does a statute that reverses the retroactive application of a new judicially created statute of limitations infringe upon the province of the courts? Was the congressional response to *Lampf* a reclaiming of the legislative function or a usurpation of the judicial role of statutory interpretation?

The most critical question remains to be answered: what is the future of the statute of limitations for private claims brought under Rule 10b-5? Congress intends to consider the issue further, and legislation has been

3. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2780 (1991).

4. See, e.g., Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U. L. Rev. 523, 547-49 (1993) (discussing judicial efforts to construct hypothetical congressional intent as to extraterritorial application of § 10(b) of the 1934 Act); Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385 (1990) (criticizing courts for interpreting § 10(b) without due regard for the legislative history).

5. 111 S. Ct. 2773 (1991).

6. See *id.* at 2781. The Court further concluded that the federal limitations period was one year from the date plaintiff discovered the fraud but, in no event, more than three years from the date of the fraud and that the new limitations period should be applied retroactively. See *id.* at 2782.

7. The only prior congressional action in this area was limited to private claims relating to insider trading. See Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78t-1 (1988) (providing private civil remedy for those who trade contemporaneously with an insider); Insider Trading Sanctions Act of 1984, 15 U.S.C. § 78u(d)(2) (1988) (imposing civil remedies for insider trading on non-trading tippers). The theoretical basis and required elements of insider trading liability have also been developed by the courts rather than Congress. See Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 Ga. L. Rev. 179 (1991) (describing development of insider trading regulation).

8. That amendment, included as part of the Federal Deposit Insurance Corporation Improvement Act of 1991, is discussed in detail in the text accompanying notes 100-52, *infra*.

introduced to expand the limitations period in future cases. If the mess generated by this first statute is any indication, we should be wary of future congressional forays into securities fraud legislation.

I. HISTORY OF THE 10b-5 STATUTE OF LIMITATIONS

For nearly four decades, courts struggled with the issue of determining the applicable statute of limitations for 10b-5 claims. In the absence of an express statute of limitations for private federal securities fraud claims, courts followed the rules applicable to other federal claims in which there was no express federal period; they "borrowed" the statute of limitations from the most closely analogous state law⁹ cause of action.¹⁰

Borrowing from state law was not as straightforward as it might appear. First, there was the question of which state cause of action was most closely analogous to federal securities fraud.¹¹ While some circuits chose to borrow from state securities laws or blue sky laws, others looked to the statute of limitations applicable to common law fraud or misrepresentation.¹² Courts then had to determine whether they should borrow equitable provisions to toll the statute of limitations, such as discovery periods, equitable tolling doctrines, or delayed accrual due to fraudulent

9. The first appellate court decision to borrow a state law limitations period for a Rule 10b-5 cause of action was *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951).

10. Courts had concluded that this approach was dictated by the Rules of Decision Act, 28 U.S.C. § 1652 (1988), which provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2784 n.2 (Stevens, J., dissenting).

11. Borrowing from state law presented an additional problem in that state law limitations periods were frequently amended. See *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1388-89 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991) (describing difficulty of borrowing a period for a claim that accrued in 1977 but was litigated after the 1985 amendment of Illinois' statute of limitations in its blue sky law); see also *In re Sioux, Ltd., Securities Litigation*, 914 F.2d 61, 64 (5th Cir. 1990) (reversing dismissal of claims as time-barred after Texas amended its statute of limitations for common law fraud from two years to four years).

12. See *Short*, 908 F.2d at 1388 ("Some [courts] borrow from the statute generally applicable to fraud; some borrow from state blue sky laws; some courts use a little of each . . ."). These were not the only state law sources used. Some courts borrowed from state personal injury law. See *Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123, 127 (1st Cir. 1987). Others applied the limitations period provided by general catchall provisions. See *Holmes v. Bateson*, 434 F. Supp. 1365, 1379 (D.R.I. 1977), *modified*, 583 F.2d 542 (1st Cir. 1978); see also *Ceres Partners v. Gel Assocs.*, 918 F.2d 349, 354-55 (2d Cir. 1990) (citing cases taking borrowing from common law fraud, blue sky laws, personal injury, and general catchall statutes of limitations); *Lyman Johnson, Securities Fraud and the Mirage of Repose*, 1992 Wis. L. Rev. 607, 608-09 n.2 (1992) (citing cases borrowing from blue sky laws versus common law fraud); Thomas Stewart, Note, *One Statute, One Statute of Limitations; At Last Uniformity for Section 10(b) Claims*, 60 U. Cin. L. Rev. 533, 557 n. 197 (1991) (same).

concealment.¹³ The adoption of these doctrines in some circuits gave rise, in turn, to further questions: for example, if the statute does not begin to run until discovery, is it activated when plaintiff knows of the claim or when plaintiff should have known?¹⁴

Furthermore, since the answer to these questions varied from state to state, courts had to undertake a choice-of-law analysis to determine both which circuit's legal doctrine and which state's limitations law to apply.¹⁵ Because federal securities fraud, by definition, requires that the transaction at issue involve interstate commerce, courts could arguably apply at least two state statutes to any claim. In securities fraud class actions, this meant that courts could conceivably be called upon to apply dozens of different limitations periods in a single lawsuit.¹⁶

The variety of answers to these questions meant that both the statute of limitations for federal securities fraud and the manner in which it was applied differed from state to state and from case to case. This gave plaintiffs an unparalleled ability to forum shop. This was particularly true because of the liberal venue provisions of the federal securities laws coupled with the national character of many securities transactions. A securities fraud class action based on transactions in stock listed on a national exchange, for example, could generally be brought in virtually any state.¹⁷

13. See *Short*, 908 F.2d at 1387 (describing circuit's practice of adding to the borrowed limitations period "an overlay of tolling principles from state and federal law"). For a detailed examination of the principles of equitable tolling and fraudulent concealment as applied to federal securities fraud, see Johnson, *supra* note 12.

14. Courts generally agreed that questions about the application of the statute of limitations were governed by federal law so that, for example, federal law governed application of the discovery rule. See, e.g., *Corwin v. Marney, Orton Investments*, 843 F.2d 194, 198 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988):

Although the federal securities laws borrow statutes of limitations from state law, federal law determines when the limitations periods begin to run. It is federal law that imposes the discovery rule, and thus federal law should determine what circumstances and information should alert the suspicions of a reasonably diligent investor.

(citations omitted).

15. This combination resulted in the application of varied limitations periods for securities fraud even within a single circuit, depending on the state law applicable to any particular claim. Thus, for example, the First Circuit had applied two, three, and six year limitations periods in recent cases, depending on whether it was borrowing from the Maine two-year statute of limitations, the Massachusetts three-year statute, or the Rhode Island six-year statute. See *Ceres Partners*, 918 F.2d 349, 354-55 (describing varied limitations periods applied in First, Second, Fourth, Sixth, Seventh, and Ninth Circuits).

16. See, e.g., *Kronfeld v. Advest, Inc.*, 675 F. Supp. 1449, 1457-58 & n.21 (S.D.N.Y. 1987) (applying 26 separate limitations periods); *In re National Student Marketing Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 97,926 (D.D.C. Mar. 26, 1981) (addressing issues raised by potential application of limitations periods of more than 34 different jurisdictions).

17. The plaintiff's ability to choose a forum state required courts frequently to address a choice of law question as well. Because of the broad jurisdiction and venue provisions of the federal securities laws, courts then faced the additional question of whether the

Dissatisfaction¹⁸ with the logistics of borrowing securities fraud limitations periods from state law did not directly cause the courts to reconsider the practice. Rather, the validity of the borrowing approach was called into question by a series of Supreme Court decisions outside the securities area holding that, in appropriate cases, it was preferable to look to federal law as the source of limitations period when the federal statute in question was silent.

In *DelCostello v. International Brotherhood of Teamsters*,¹⁹ the Supreme Court was called upon to determine the statute of limitations for two claims filed by employees under a federal labor statute that contained no statute of limitations provision. The employees' claims had been dismissed by lower courts that had borrowed the limitations period from state law. The Court held that this borrowing was not appropriate. First, the Court concluded that the state borrowing rule was not compelled by the Rules of Decision Act. Because the Act only compelled application of state law in the absence of federal law, if federal law was found to furnish an appropriate statute of limitations, the Act would not apply.²⁰

Second, the Supreme Court stated that state law does not always furnish an appropriate limitations period, particularly when that period conflicts with the objectives of the federal statute. As the Court explained it, "[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies."²¹ Accordingly, the Court held that if a limitations period "from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking,"²² the federal courts should borrow the federally prescribed period rather than looking to state law.

The Court continued the approach adopted in *DelCostello* in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*²³ *Agency Holding* concerned a civil claim under the federal Racketeer Influenced and Corrupt Organization Statute²⁴ ("RICO"). Although RICO contains an express

state in which they sat mandated the application of the forum state's law or required use of a borrowing statute.

18. Cf. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1389 (7th Cir. 1990) ("With a unanimity unmatched in any other corner of securities law, everyone wants a simpler way—and to everyone that means a uniform federal statute of limitations."), *cert. denied*, 111 S. Ct. 2887 (1991).

19. 462 U.S. 151 (1983).

20. *See id.* at 159 n.13.

21. *Id.* at 161 (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977)).

22. *Id.* at 171-72.

23. 483 U.S. 143 (1987).

24. 18 U.S.C. § 1964 (1988).

private right of action, it does not provide a statute of limitations. The prior practice under RICO, as under Rule 10b-5, had been to borrow a statute of limitations from state law.²⁵ In *Agency Holding*, the trial court had determined that the plaintiff's claim was time barred under Pennsylvania's statute of limitations for fraud claims.²⁶ The Third Circuit reversed, finding that, although Pennsylvania law furnished the appropriate source of a limitations period for RICO claims, the more appropriate period was that of the longer Pennsylvania residual statute of limitations.²⁷

The Supreme Court held that, as in *DelCostello*, state law did not provide an appropriate limitations period because the state law sources were not sufficiently analogous to the type of federal claim provided under RICO.²⁸ Moreover, the interstate nature of racketeering militated in favor of a uniform federal limitations period. In looking for a federal borrowing source, the Court noted that RICO had been modeled, in large part, on the Clayton Antitrust Act.²⁹ Accordingly, the Court concluded that the objectives of the RICO statutory scheme would best be served by applying the four year limitations period of the Clayton Act.³⁰

The *DelCostello* and *Agency Holding* decisions, coupled with the pre-existing inconsistency among the circuits with respect to the appropriate state source for borrowing a limitations period, led several courts to reconsider the validity of their borrowing practices with respect to 10b-5 claims. In *In re Data Access Systems Securities Litigation*,³¹ the Third Circuit, sitting *en banc*, was asked to decide whether 10b-5 claims in New Jersey should be governed by New Jersey's six year limitations period for common law fraud or the two year period provided by New Jersey blue sky laws.³²

Rejecting both these options, the court determined that state law did not properly address the regulatory objectives of the federal securities laws.³³ In the court's view, Congress had expressly rejected the approach of both common law fraud and the state blue sky laws when, in 1934, it adopted the Securities Exchange Act.³⁴ Moreover, the nature of securities fraud litigation required, according to the court, a uniform federal limitations period.³⁵ The court also noted that most federal securities

25. See *Agency Holding*, 483 U.S. at 149.

26. See *id.* at 146.

27. See *id.*

28. See *id.* at 150.

29. See *id.* at 150-51 (citing 15 U.S.C. § 15).

30. See *id.* at 156.

31. 843 F.2d 1537 (3d Cir.) (en banc), *cert. denied*, 488 U.S. 849 (1988).

32. See *id.* at 1538. The district court certified the question to the Third Circuit pursuant to 28 U.S.C. § 1292(b), which permits certification for appellate review of a "controlling question of law as to which there is substantial ground for difference of opinion." *Data Access*, 843 F.2d at 1551 n.1 (Seitz, J., dissenting).

33. See *Data Access*, 843 F.2d at 1547-49.

34. See *id.* at 1548-49.

35. See *id.* at 1549.

claims were already subject to a uniform statute of limitations: a one-and-three year limitations period.³⁶ Accordingly, the court adopted this period for 10b-5 claims. Under the *Data Access* approach, a 10b-5 claim was timely if it was filed within "one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation."³⁷

In *Short v. Belleville Shoe Manufacturing Co.*,³⁸ the Seventh Circuit also chose to use a uniform federal limitations period for securities fraud claims. Seizing upon the holdings in *Agency Holding* and *DelCostello* that the Rules of Decision Act does not require federal courts to borrow limitations periods from state law, Judge Easterbrook's opinion concluded that "[t]hese cases call for fresh examination of the question whether to turn to state law in securities cases."³⁹ Citing numerous policy justifications, including the interstate nature of federal securities fraud, the impracticalities of inconsistent rules in different circuits, the opportunities for forum-shopping, and the abundant federal limitations periods available in other sections of the federal securities laws, the Seventh Circuit overturned its previous rule and held that "federal and not state law supplies the statute of limitations in suits under § 10(b) and Rule 10b-5."⁴⁰ The *Short* court then examined federal law and concluded that the most closely analogous federal limitations period was the one-and-three year period contained in section 13 of the Securities Act of 1933.⁴¹ Accordingly, the court applied that period to bar the plaintiff's claims.⁴²

The Second Circuit followed these examples in *Ceres Partners v. Gel Associates*.⁴³ In *Ceres Partners*, the court acknowledged that its state law borrowing practices would, under the facts of this case, require it to borrow from the Third Circuit, which had adopted a one-and-three year

36. See *Data Access*, 843 F.2d at 1548-49. This was the period applicable to claims under §§ 9(e), 18(c), and 29(b) of the 1934 Act.

37. *Data Access*, 843 F.2d at 1550.

38. 908 F.2d 1385 (7th Cir. 1990).

39. *Id.* at 1388. The Seventh Circuit had decided, in *Norris v. Wirtz*, 818 F.2d 1329, 1332-33 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987), that the federal statute of limitations found in § 13 of the Securities Act provided a closer fit for 10b-5 claims than state law but declined to adopt the federal statute in place of state borrowing, reasoning that it was "too late for an inferior federal court to turn back the clock." *Id.* at 1333. One month later, the Supreme Court decided *Agency Holding*.

40. *Short*, 908 F.2d at 1389.

41. See *id.* at 1390-92. Section 13 of the Securities Act of 1933 provides an express limitations period for claims involving misrepresentation and fraud in connection with the sale of securities. See 15 U.S.C. § 77m (1988). This period operates in a similar fashion to the statute of limitations adopted in *Data Access*. See *Short*, 908 F.2d at 1390-92.

42. See *Short*, 908 F.2d at 1390-92. The Seventh Circuit also rejected the argument that the doctrine of equitable tolling could be used to extend plaintiff's time to sue beyond the three year period of repose, citing both the structure of the statutory provision and the policy of setting an outer limit on securities fraud claims. See *id.* at 1391-92.

43. 918 F.2d 349 (2d Cir. 1990).

limitations period.⁴⁴ Both parties, however, pressed the court to adopt a uniform federal rule.⁴⁵ After considering both the practical problems of state borrowing and the legislative purpose of federal regulation, the court agreed that a federal limitations period was appropriate and held that the most closely analogous period was the one-and-three year period provided in sections 9(e) and 18(a) of the Exchange Act.⁴⁶

The decisions in *Data Access*, *Short*, and *Ceres Partners* to adopt a uniform federal statute of limitations created a conflict among the circuits. Although three circuits adopted uniform limitations periods, the other circuits refused to follow their example and reaffirmed their intentions to look to state law.⁴⁷ It is not clear, however, that this reflected a deep or permanent split among the circuits. The disagreement between courts can better be described as the middle stage of an evolutionary process.

Both in the circuits that followed the reasoning in *Data Access* and in those that did not, there were indications that the progression of Supreme Court⁴⁸ and circuit cases addressing the subject was causing

44. See *id.* at 352-53. The Second Circuit borrowing rule required the court to look to the choice of law rules of New York CPLR § 202, which directed application of the laws of the state where the action accrued. In § 10(b) cases, this had been construed by courts in the Second Circuit to mean the state where the "economic impact [of the fraud] is felt, normally the plaintiff's residence." *Ceres Partners*, 918 F.2d at 353 (citations omitted). Because *Ceres* was a citizen of New Jersey, this rule would have resulted in the application of the statute of limitations used by federal district courts in New Jersey which meant, at the time of *Ceres Partners*, following *Data Access*. See *id.*

45. See *Ceres Partners*, 918 F.2d at 352. The plaintiff, joined by the SEC as amicus, argued that the court should borrow the five year statute of limitations provided by Congress in the Insider Trading Sanctions Act of 1984, 15 U.S.C. § 78t(d), as amended by the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78t-1. See *Ceres*, 918 F.2d at 362-63.

46. See *Ceres Partners*, 918 F.2d at 364.

47. See *Nesbit v. McNeil*, 896 F.2d 380, 384-85 (9th Cir. 1990); *Smith v. Duff & Phelps, Inc.*, 891 F.2d 1567, 1569-70 (11th Cir. 1990); *Jensen v. Snellings*, 841 F.2d 600, 606-07 (5th Cir. 1988). In each of these cases, the courts chose to continue their former practice of looking to analogous state law for a statute of limitations in Rule 10b-5 actions.

48. Part of the problem is that the Supreme Court's instructions have not been clear. After *DelCostello*, the Court appeared to retreat from its position favoring federal limitations periods for federal causes of action. In *Wilson v. Garcia*, 471 U.S. 261 (1985), the Court rejected the need for a uniform federal limitations period for private civil rights actions brought under § 1983 and decided that a single limitations period should be chosen for such actions within each state. See *Garcia*, 471 U.S. at 275. Similarly, after *Agency Holding*, the Court decided *Reed v. United Transportation Union*, 488 U.S. 319 (1989), in which it borrowed the limitations period for a labor law claim from state law and reiterated that

the general rule [is] that statutes of limitation are to be borrowed from state law. We decline to borrow a state statute of limitations only "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."

Id. at 324 (quoting *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983)).

courts to reevaluate their prior practice of "turning to state periods of limitations . . . on auto-pilot."⁴⁹ For example, the Seventh Circuit had initially refused to change its practice of borrowing from state law after the Supreme Court decided *DelCostello*, but then reconsidered in *Short* after the Court had ruled in *Agency Holding*.⁵⁰ Similarly, although the First Circuit rejected a request to adopt a federal limitations period for securities fraud in a 1987 decision,⁵¹ the following year it looked to federal law for the source of a statute of limitations for a federal labor law claim and, in the course of that opinion, cited *Data Access* with approval.⁵² Moreover, in at least two of the panel opinions in which circuit courts had rejected a federal limitations period, the courts indicated their reluctance to change prior circuit practice in the absence of *en banc* consideration.⁵³

Although the Supreme Court initially refused to hear the question,⁵⁴ it eventually granted certiorari to consider the appropriate statute of limitations for federal securities fraud.⁵⁵

II. THE *LAMPF* DECISION

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,⁵⁶ the Supreme Court addressed the proper statute of limitations for private claims under Rule 10b-5. After reviewing the recent decisions in which lower courts had debated the merits of borrowing from state law, the Court rendered a decision that greatly simplified federal securities fraud litigation. The Court held that a uniform statute of limitations was appropriate for 10b-5 claims and that the limitations period should be borrowed from a federal source.⁵⁷

The Court explained that other provisions of the 1934 Act were more closely analogous to section 10(b) and Rule 10b-5 than state law.⁵⁸ After considering several statutes of limitations provided by other sections of the Act, the Court concluded that section 9(e), which applies a one-and-three year limitations period to suits relating to manipulation of security

49. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1387 (7th Cir. 1990).

50. *See id.* at 1389 (discussing court's prior reluctance to "jettison [its] existing approach" in *Norris*).

51. *See Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123, 127-29 (1st Cir. 1987).

52. *See Communications Workers of America v. Western Elec. Co.*, 860 F.2d 1137, 1139 (1st Cir. 1988).

53. *See Smith v. Duff & Phelps, Inc.*, 891 F.2d 1567, 1570 (11th Cir. 1990) (settled circuit practice prevents court from overruling prior cases and adopting *Data Access* approach in the absence of an *en banc* proceeding); *Nesbit v. McNeil*, 896 F.2d 380, 384 (9th Cir. 1990) (as panel, court bound by prior cases).

54. The court denied certiorari in both *Data Access*, 488 U.S. 849 (1988), and *Short v. Belleville Shoe Mfg. Co.*, 111 S. Ct. 2887 (1991).

55. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 242 (1990) (granting certiorari).

56. 111 S. Ct. 2773 (1991).

57. *See id.* at 2780-82.

58. *See id.* at 2780-81.

prices, provided the best fit and should be the source from which the limitations period for Rule 10b-5 claims is borrowed.⁵⁹ It held that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 therefore must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation."⁶⁰

The majority opinion did not explicitly address what became the most controversial aspect of the *Lampf* decision: the question of whether to apply the uniform federal statute of limitations retroactively to pending private claims brought under Rule 10b-5. Previously, in *Chevron Oil Co. v. Huson*,⁶¹ the Court had developed a framework for analyzing whether decisions should apply retroactively and had applied that framework when it announced a new statute of limitations. Nonetheless, in *Lampf*, the issue did not merit even a footnote in the majority opinion. The Court simply concluded that, in light of the undisputed fact that none of plaintiffs' claims was filed within three years after petitioner's alleged misrepresentations, the claims were untimely under the three year statute of repose.⁶² It therefore reversed the judgment of the Court of Appeals.⁶³

Lampf generated four additional opinions.⁶⁴ Justices Stevens, in a dissenting opinion in which Justice Souter joined, disagreed with the majority's decision to adopt a uniform federal statute of limitations.⁶⁵ Believing that this approach, while justified on policy grounds, was more appropriately left to Congress, Justice Stevens argued that the Court should defer to four decades of established law and continue to borrow from state law. In a dissent in which Justice O'Connor joined, Justice Kennedy argued that, although adoption of a uniform federal limitations period was appropriate, it should not include a three year statute of repose.⁶⁶

Justice O'Connor also dissented separately to emphasize her disagreement with the Court's decision to apply its holding to the parties before

59. *See id.* at 2781.

60. *Id.* at 2782. The Court also considered whether the limitations period, specifically the three year statute of repose, was subject to the doctrine of equitable tolling. *See id.* It concluded that this doctrine was fundamentally inconsistent with the one-and-three year limitations structure. *See id.* The purpose of the three year statute of repose, according to the Court, was to impose an outside limit on claims. This limit would be eviscerated if equitable tolling was permitted. *See id.*

61. 404 U.S. 97 (1971).

62. *See Lampf*, 111 S. Ct. at 2782.

63. *See id.* at 2783.

64. In addition to the opinions discussed below, Justice Scalia, who joined in most of the majority opinion, wrote a separate opinion questioning the methodology of judicially created limitations periods, particularly for judicially created causes of action. Justice Scalia described the process of implying a statute of limitations for an implied cause of action as "too lawless to be imagined" but concluded that when confronted with the situation, the most responsible approach was to borrow from an analogous federal cause of action. *See id.* (Scalia, J., concurring in part and concurring in the judgment).

65. *See id.* (Stevens, J., dissenting).

66. *See id.* at 2788 (Kennedy, J., dissenting).

it.⁶⁷ "Until today, however," Justice O'Connor wrote, "the Court has *never* applied a new limitations period retroactively to the very case in which it announced the new rule so as to bar an action that was timely under binding Circuit precedent."⁶⁸

Justice O'Connor was not alone in questioning the retroactive application of the new statute of limitations. Although courts and commentators praised the adoption of a uniform federal statute of limitations, many could not quite believe that the Court intended its *Lampf* holding to be retroactive. The losing plaintiffs in *Lampf* felt the issue was sufficiently ambiguous to file a petition for rehearing on the issue of retroactivity. That petition was denied.⁶⁹

The Court clarified its intent that the holding in *Lampf* be applied to all pending actions under Rule 10b-5 in two other rulings. First, on the same day that it announced its decision in *Lampf*, the Court decided *James B. Beam Distilling Co. v. Georgia*.⁷⁰ In *James Beam*, the Court held that the doctrine of selective prospectivity, which the Court had previously "abandoned in the criminal context,"⁷¹ was also inappropriate in the civil context.⁷² Although a new civil holding could be applied retroactively or prospectively,⁷³ the Court stated that, "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."⁷⁴ The implication of this holding for *Lampf* was that, having applied the federal limitations period to the litigants in that case, the Court expected the period to be applied retroactively to other pending cases.⁷⁵

67. See *id.* at 2785 (O'Connor, J., dissenting).

68. *Id.* at 2786 (O'Connor, J., dissenting).

69. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 112 S. Ct. 27 (1991) (denying petition for rehearing).

70. 111 S. Ct. 2439 (1991).

71. *Id.* at 2444-45 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

72. See *id.* at 2446. Selective prospectivity involves a court applying its holding to the litigants in the case before it, but declining to make the holding otherwise retroactive. See *id.* at 2444.

73. See *id.* at 2447-48. The Court had previously announced a test to determine whether a new rule of law should be applied retroactively or prospectively in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The *Chevron Oil* test required a court to apply its decision prospectively where its decision involved a new rule of law, where the litigants may have reasonably relied upon the old rule, and "where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application." *James Beam*, 111 S. Ct. at 2445 (citing *Chevron Oil*, 404 U.S. at 106-07). In *James Beam*, the Court seemed to retreat from its holding in *Chevron Oil*, stating that retroactivity should be the norm in civil cases based on principles of equality and fairness. See *id.* at 2446. The Court refused, however, to "speculate as to the bounds or propriety of pure prospectivity." *Id.* at 2448.

74. *Id.*

75. The Court had anticipated this approach in the criminal area. See Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts after Teague v. Lane*, 69 N.C. L. Rev. 371, 375-76 (1991) (examining Supreme Court's approach to retroactive application of new rules of constitutional criminal procedure). An analysis of the retroactivity issue in *Lampf* is beyond the scope of this Article.

The Supreme Court gave further evidence of its intention that *Lampf* be applied retroactively through its action in *Welch v. Cadre Capital*.⁷⁶ *Welch*, which was pending at the time the Court decided *Lampf*, originally involved the question of whether the Second Circuit would apply its holding in *Ceres Partners* retroactively. Although the Second Circuit had adopted a federal limitations period in *Ceres Partners*, it refused to apply that holding in *Welch*.⁷⁷ Instead, the court applied the three-part analysis of *Chevron Oil*⁷⁸ and concluded that the *Ceres Partners* holding would not be applied retroactively, based on the facts of the *Welch* case.⁷⁹ The Supreme Court granted certiorari in *Welch*, vacated the judgment, and remanded the case for reconsideration in light of *James Beam* and *Lampf*.⁸⁰ Upon remand, the Second Circuit concluded that *Lampf* applied retroactively.⁸¹ Other circuits have unanimously agreed.⁸²

III. THE RESPONSE AND REACTION TO *LAMPF*

The immediate response to *Lampf* was one of shock and dismay.⁸³ Because many of the previously applicable state statutes of limitations either were longer or did not contain a statute of repose, and because courts had also been using equitable tolling principles to delay the running of limitations periods, the retroactive application of *Lampf* meant that a number of lawsuits that were timely when filed were now time-barred.⁸⁴ Lower courts were virtually unanimous in concluding that the combination of the decisions in *Lampf* and *James Beam* required such suits to be dismissed.⁸⁵

76. 923 F.2d 989 (2d Cir.), *vacated sub nom.* Northwest Sav. Bank v. Welch, 111 S. Ct. 2882 (1991).

77. *See id.* at 990-91.

78. *See id.* at 993-95. For a discussion of *Chevron Oil*, *see supra* note 73.

79. *See id.* at 994-95.

80. *See* Northwest Sav. Bank v. Welch, 111 S. Ct. 2882 (1991).

81. *See* Welch v. Cadre Capital, 946 F.2d 185, 188 (2d Cir. 1991).

82. *See* Lufkin v. McCallum, 956 F.2d 1104, 1108 (11th Cir.), *cert. denied*, 113 S. Ct. 326 (1992); Howard v. Haddad, 962 F.2d 328, 330 (4th Cir. 1992); Boudreau v. Deloitte, Haskins & Sells, 942 F.2d 497, 498 (8th Cir. 1991).

83. This reaction was based primarily on the fact that *Lampf* shortened the limitations period in many jurisdictions, rejected equitable tolling principles, and applied retroactively to allow dismissal of pending cases. In contrast, the Court's adoption of a uniform federal limitations period was a long-awaited development that was generally well-received. *See, e.g., The Supreme Court, 1990 Term: Leading Cases*, 105 Harv. L. Rev. 177, 400 (1991) ("*Lampf* brings a welcome end to the uncertainty and disparity among jurisdictions in setting limits to 10b-5 actions.>").

84. *See, e.g.,* 137 Cong. Rec. S18,624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan) ("*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suits pending—applying a shorter statute of limitations than when they brought their suits."); Barbara Roper, *Stop the Clock on Swindlers*, N.Y. Times, Nov. 19, 1991, *reprinted in* 137 Cong. Rec. at S18,624 (daily ed. Nov. 27, 1991) (criticizing *Lampf*'s shorter limitations period and retroactive application).

85. *See generally* Johnson, *supra* note 12, at 610 n.6 (describing effect of *Lampf* decision on pending cases and observing that "numerous pending cases" were dismissed).

To many litigants and a number of congressional representatives, these dismissals were unfair. This concern was exacerbated by the prevailing political climate. *Lampf* was decided during a period in which public opinion of the securities markets was at virtually an all-time low. Several scandals had recently rocked the country, including Ivan Boesky's insider trading, the fraud at many savings and loan institutions, the BCCI fraud, and the disclosure of corruption in the junk bond market that led to the prosecution of Michael Milken. Many observers viewed the effect of the *Lampf*-generated dismissals as permitting the wrongdoers behind these frauds to escape responsibility for their actions.⁸⁶

Congress immediately began considering a number of bills designed to overturn *Lampf*. Senator Bryan introduced one of the first, the Securities Investor Protection Act of 1991.⁸⁷ The Bryan bill proposed amending the Exchange Act to require claims for securities fraud to be brought within the latter of two years from the date of discovery of the fraud or five years from the date of the fraud.⁸⁸ Congressman Markey introduced a similar bill in the House, the Securities Investors Legal Rights Act of 1991.⁸⁹ The Markey bill would have provided that a securities fraud suit was timely if filed within five years of the transaction or three years from when the fraud was discovered or should have been discovered,⁹⁰ whichever came later.⁹¹

The proposed legislation was controversial.⁹² In legislative hearings, many testified in support of extending the statute of limitations. One proponent of a longer limitations period was Chairman Breeden of the SEC, who stated that the *Lampf* limitations period was "unrealistically short."⁹³ As support for this view, Chairman Breeden testified about the

86. See, e.g., 137 Cong. Rec. H11,812, 102d Cong., 1st Sess. (daily ed. Nov. 26, 1991) (statement of Congressman Markey):

In that one action, the case of *Lampf* versus Gilbertson, the Supreme Court signed over a multibillion dollar check to Michael Milken, Charles Keating, and a coalition of special interests which produced the financial wreckage of the 1980's] [a]nd threatened as well the recovery of billions of taxpayer dollars in S&L and bank failures attributable to securities fraud.

87. See S. 1533, 102d Cong., 1st Sess. (1991) [hereinafter Bryan bill].

88. The bill would also have eliminated the retroactive effect of the *Lampf* decision and allowed pending suits to proceed under the new limitations period. See *id.*

89. See H.R. 3185, 101st Cong., 1st Sess. (1991) [hereinafter Markey bill].

90. See *id.* § 2(a). The three years would run from "the date on which the violation was discovered or should have been discovered through the exercise of reasonable diligence." *Id.*

91. The Markey bill also provided for the reinstatement of claims that had been dismissed as time barred under *Lampf* if they would have been timely under the statute of limitations applicable in that jurisdiction prior to the *Lampf* decision or if they were timely under the new statute of limitations provided by the bill. See *id.*

92. See SEC Reiterates Support for Extending Limitations Period for Private Lawsuits, 23 Sec. Reg. & L. Rep. (BNA) 1433 (Oct. 4, 1991) (describing both support and opposition for legislation and quoting prepared statement by Subcommittee Chairman Christopher Dodd (D-Conn) noting "that a coalition representing 'a broad spectrum of American business' has formed in opposition to the Bryan bill").

93. Securities Investor Protection Act of 1991: Hearing on S. 1533 Before the Sub-

importance of private securities fraud suits in the enforcement of the federal securities laws and observed that the Senate's two-and-five year period balanced the societal interests in prompt filings and finality of transactions against the door-closing effect of a limitations period.⁹⁴

But there were signs that the Administration, which had indicated concern about excessive private securities litigation, did not concur with the Chairman's position.⁹⁵ Extending the statute of limitations would expand further an already problematically expansive area of litigation. Many in the securities industry had long been critical of the proliferation of strike suits, noting that most private securities fraud suits yield settlements in which the primary beneficiaries are the plaintiffs' attorneys.⁹⁶ Critics also warned that securities fraud lawsuits were crippling industry and innovation in order to benefit stock speculators and attorneys.⁹⁷

The ultimate resolution was a political compromise⁹⁸ spurred by the fact that many in Congress believed a quick solution was urgently necessary to address the retroactive effect of *Lampf* on pending cases before the rapidly-approaching end of the Fall 1991 term.⁹⁹ The broad questions about whether it was appropriate to extend the statute of limitations for Rule 10b-5 claims, coupled with the Administration's resistance to such an extension in the absence of other litigation reforms, made it unlikely that Congress could resolve these issues in time. Accordingly, Congress decided, in November 1991, to tack a provision reversing the retroactive effect of *Lampf* onto the omnibus federal banking bill.¹⁰⁰ The bill, including this provision, was signed by President Bush on December 19, 1991.¹⁰¹

The provision, as enacted, did not provide a general statute of limita-

comm. on Securities of the Comm. on Banking, Housing, and Urban Affairs, 102d Cong., 1st Sess. 13 (1991) (prepared testimony of Chairman Breeden).

94. See *id.* at 14-15.

95. See, e.g., *White House Says Lampf Proposal Must be Combined with Curbs on Litigation Abuses*, 23 Sec. Reg. & L. Rep. (BNA) 1643 (1991) (reporting announcement by the administration that it opposed congressional efforts to extend the limitations period for private civil securities fraud suits unless Congress also enacted measures to curb meritless litigation).

96. See *infra* notes 167-70 and accompanying text.

97. See 137 Cong. Rec. S17,356-57 (daily ed. Nov. 21, 1991) (statement of Sen. Domenici) (arguing against extending limitations period for securities fraud without addressing "the growing number of meritless 10(5) [sic] cases that are making it harder and harder for U.S. companies to focus on developing better products and competing internationally"); see also *SEC Reiterates Support for Extending Limitations Period for Private Lawsuits*, 23 Sec. Reg. & L. Rep. (BNA) 1433 (1991) (describing testimony urging Congress not to consider the statute of limitations question in isolation but to view it in the context of broader securities fraud litigation reform).

98. See 137 Cong. Rec. H11,811 (daily ed. Nov. 26, 1991) (prepared statement of Rep. Dingell) (describing S. 543 as including a "compromise" to reverse the retroactive application of *Lampf*).

99. See *id.* (describing reversal of retroactive aspect of *Lampf* as "urgently needed").

100. Section 476 of S. 543, the omnibus banking reform bill, amended the 1934 Act by adding a new section, § 27A. The text of § 27A appears in note 102, *infra*.

101. The statute of limitations provision was enacted as § 476 of the Federal Deposit

tions for Rule 10b-5 claims. Instead, the statute amended the Securities Exchange Act of 1934 by adding a narrowly tailored provision, section 27A, addressed solely to the application of *Lampf* to pending cases.¹⁰² Briefly, section 27A provided that (1) claims filed prior to the date of the *Lampf* decision which were timely under the laws of the applicable jurisdiction, including principles of retroactivity,¹⁰³ were to be considered timely filed; and (2) claims that had been dismissed based on *Lampf* could be reinstated within sixty days upon plaintiff's motion.¹⁰⁴

IV. THE LEGITIMACY OF SECTION 27A

A. *The Application of the Statute*

The adage "haste makes waste" seems aptly applied to section 27A. The enactment and application of this provision have already spilled an enormous quantity of judicial ink, as shell-shocked litigants and courts have attempted to assess both the legitimacy of the statute and its impact on pending cases—cases that are rapidly taking on an otherworldly aura as they are killed and revived by turns. Before examining the legitimacy of section 27A, however, a preliminary question is in order: What precisely did Congress do in adopting this statutory amendment?

As written, section 27A directs courts to determine whether a case

Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991) (codified at 15 U.S.C. § 78aa-1 (Supp. III 1991)).

102. Section 27A of the 1934 Act reads as follows:

(a) Effect on pending causes of action

The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) Effect on dismissed causes of action

Any private civil action implied under section 78j(b) of this Title that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

15 U.S.C. § 78aa-1 (Supp. III 1991).

103. This part of the statute appears addressed to those circuits that had adopted the one-and three-year limitations period but that had not yet determined whether to apply that period retroactively. *See, e.g., Ceres Partners v. Gel Assocs.*, 918 F.2d 349, 364 (2d Cir. 1990) (leaving "for the future all questions concerning retroactive application"). Following *James Beam*, these courts began to apply the new limitations period retroactively. *See Welch v. Cadre Capital*, 946 F.2d 185 (2d Cir. 1991). By addressing § 27A to the retroactivity issue as well as to the underlying limitations period, Congress seemed to be precluding the application of *James Beam* to these pending cases, as well as *Lampf*. *See Walsche v. First Investors Corp.*, 961 F.2d 649, 652 (2d Cir. 1992) (describing effect of § 27A as directing courts back to the case-specific retroactivity analysis of *Chevron*). A detailed discussion of the retroactivity issues raised by *James Beam* and § 27A is beyond the scope of this Article.

104. *See Walsche*, 961 F.2d at 652.

filed prior to June 19, 1991, was timely by applying the law as it existed as of that date, including principles of retroactivity. The statute does not explain, however, the manner in which a court is to choose what the limitations period was on June 19, 1991. Presumably, Congress intended courts to apply whatever rule had been used to determine the statute of limitations in the most recent circuit or district court case preceding *Lampf*.

As the foregoing discussion demonstrated, however, the status of limitations periods for 10b-5 claims prior to the *Lampf* decision was far from clear. The rules varied from circuit to circuit and even within circuits and were repeatedly subject to modification depending on the evolution of federal law, changes in the interpretation of state borrowing rules, and even changes to the underlying state limitations periods.¹⁰⁵ In the absence of explicit congressional guidance, courts were acting in a quasi-legislative capacity in applying these rules; that is, they were developing federal common law.

What then was the true effect of the Supreme Court's decision in *Lampf*? There are various legal theories that describe the process by which courts develop the common law. Under the so-called declaratory theory, a court simply finds or declares "the rule that had always existed yet remained hidden from view."¹⁰⁶ According to this theory, the *Lampf* Court did not make new law on June 20th, but instead simply found or declared existing law.¹⁰⁷ If *Lampf* merely declared the law, however, rather than causing a rule to spring into being on June 20, 1991, what does it mean for Congress to turn the clock back to June 19th? Did the preexisting but undiscovered law not exist on that date as well?¹⁰⁸

The common law tradition has been particularly important in the development of private federal securities fraud claims. Although private Rule 10b-5 claims have a nominal statutory basis, the judiciary has been the exclusive author of the private cause of action. This process of lawmaking is fundamentally different from the ordinary legislative process. Among other distinctions, judicial lawmaking is evolutionary rather than revolutionary; a legal rule develops and gains general acceptance over time. During the course of this development, it may be impossible to specify precisely what the governing rule is.

105. See *supra* notes 10-15 and accompanying text.

106. *In re Brichard Secs. Litig.*, 788 F. Supp. 1098, 1108 n.10 (N.D. Cal. 1992).

107. See *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring in the judgment) (judges in the common law tradition make law "as though they were 'finding it'—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow be*"); see also *TGX Corp. v. Simmons*, 786 F. Supp. 587, 592 (E.D. La. 1992) ("The limitations period 'found' in *Lampf* thus did not represent a change in the law, but rather, a mere clarification [of] what the law has always been. Courts such as the Fifth Circuit, which had previously applied other limitations periods to section 10(b) claims, had thus done so in error.").

108. Presumably the rule existed prior to that date; otherwise the lower courts that anticipated *Lampf* would have been unable to find it.

The evolutionary process is complicated by the fact that judicial law-making does not require action by the United States Supreme Court. A legal issue can be addressed by lower courts and gain general acceptance as a "clear rule of law" many years before the Supreme Court recognizes its validity.¹⁰⁹ Some issues may never be explicitly addressed by the Court.¹¹⁰

The law governing the statute of limitations for securities fraud claims developed in precisely this way. The Supreme Court never expressly endorsed the old rule of borrowing from state law.¹¹¹ To the extent that Supreme Court precedent establishes a rule of law, the only precedent squarely addressing the question of statute of limitations is *Lampf*, which holds that state borrowing is improper. Nor did the Court, in the years prior to *Lampf*, articulate a particular procedure for borrowing by, for example, explaining the principles to be used in determining which state statute was most closely analogous to the federal statute at issue. Thus, if the clear rule in 10b-5 claims was to borrow a limitations period from state law,¹¹² that rule was adopted without affirmative Supreme Court action.

With this in mind, it is difficult to understand why the Supreme Court action in *Lampf* is the trigger that changes federal law. Even if borrowing the limitations period for Rule 10b-5 claims became the rule of law

109. This point is illustrated by the development of a private right of action under Rule 10b-5. Lower court decisions began recognizing such a right as early as 1946. The first reported decision to recognize a private right of action under Rule 10b-5 was *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 513 (E.D. Pa. 1946). The Supreme Court finally acknowledged the existence of a private right of action 25 years later in *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971). Even then, however, the Court did not analyze the issue but simply concluded that the existence of a claim had been established. The Court reasoned as follows: "[i]t is now established that a private right of action is implied under § 10(b)." *Id.* at 13 n.9. Subsequent decisions by both the Supreme Court and lower courts continued to recognize the existence of the right. At what point, then, did it become "the law of the land" that a private right of action existed under Rule 10b-5? Indeed the argument was still being made in 1983, almost 40 years after *Kardon*, that the courts had exceeded their authority in implying a private right of action under rule 10b-5. *See e.g.*, *Herman & MacLean v. Huddleston*, 495 U.S. 375, 379-87 (1983) (considering whether Rule 10b-5 provided an implied private right of action for conduct subject to an express civil remedy under the 1933 Act).

110. For example, lower courts have uniformly interpreted recklessness as sufficient to meet the scienter requirement of Rule 10b-5, but the Supreme Court has not addressed the issue. *See* Richard W. Jennings, Harold Marsh, Jr. & John C. Coffee, Jr., *Securities Regulation Cases and Materials* 898 (7th ed. 1992) (stating that the Supreme Court has "left open" this question, but circuit courts have "unanimously adopted the view" that recklessness is sufficient).

111. *See* *Ceres Partners v. Gel Assocs.*, 918 F.2d 349, 355 (2d Cir. 1990) ("While the Supreme Court has noted the prevailing practice of borrowing state law for limitations periods for federal securities law claims, *see* *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384 n.18 (1983), it has not explicitly approved the practice . . .") (parallel citations omitted).

112. *Cf.* *Lampf*, *Pleva*, *Lipkind*, *Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2785 (1991) (Stevens, J., dissenting) (stating that adopting a federal limitations period for 10b-5 claims worked a "change in a rule of law").

sometime during the forty years prior to *Lampf*, it would seem that the law began to change through the combination of Supreme Court decisions questioning the borrowing doctrine and lower court cases applying the new rules to 10b-5. If this is properly viewed as an evolutionary process, the *Lampf* decision represents only one step in that process.¹¹³

All of this suggests that congressional intent in adopting section 27A extended beyond reversing *Lampf*. By directing courts to apply the law as it existed on June 19, 1991, Congress attempted not to change the law, but to freeze it for a particular class of cases. In other words, Congress is instructing the courts to ignore not just *Lampf*, but also *Agency Holding*,¹¹⁴ *DelCostello*,¹¹⁵ *Data Access*,¹¹⁶ *Short*,¹¹⁷ and all the cases casting doubt upon the continued vitality of state borrowing doctrine. Instead of selecting a rule of law for a 10b-5 statute of limitations, Congress is forbidding the application of a particular rule of law, that of a federal limitations period, in circuits that had not anticipated *Lampf*.¹¹⁸ This analysis raises another important question: Does Congress have the power to legislate in this manner?

B. *The Constitutional Questions*

The unusual nature of Congress' action in enacting section 27A immediately rendered the statute subject to challenge. Defendants who had lost the benefit of the *Lampf* limitations period through section 27A challenged the provision as unconstitutional¹¹⁹ under various theories including separation of powers, equal protection,¹²⁰ and interference with

113. It is not even clear that the *Lampf* decision was necessary to change the rule to that of a federal limitations period. The Supreme Court, after all, had declined to review the decisions in both *Short* and *Data Access*, even though both adopted the "new law" of borrowing a limitations period from federal law. In the absence of Supreme Court review, it is likely that the movement toward a uniform federal rule would have continued, with other circuits reconsidering their procedures through *en banc* proceedings or other means.

114. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987).

115. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983).

116. *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.) (en banc), *cert. denied*, 488 U.S. 849 (1988).

117. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991).

118. *See Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1571 (11th Cir. 1992) (holding that § 27A prevented it from determining, on the basis of all the available law on June 19, 1991, that the one-and-three year rule of *Lampf* was the law in the Eleventh Circuit as of that date).

119. Dozens of district court decisions have evaluated the constitutionality of § 27A. Although the courts are split, the majority have upheld the statute against challenge. To date, only two circuit courts have addressed the issue, and both have found the statute constitutional. *See Anixter v. Home-Stake Production Co.*, 977 F.2d 1533, 1547 (10th Cir. 1992); *Henderson*, 971 F.2d at 1573.

120. *See Henderson*, 971 F.2d at 1571, 1574. The Equal Protection Clause requires that similarly situated parties be treated the same under the law. Although defendants in securities fraud cases are not a suspect class, the legislature must have a rational basis for

defendants' vested rights in a final judgment.¹²¹ The remainder of this discussion will focus on the separation of powers question, the theory that has been the most widely raised basis for challenging section 27A.¹²²

The separation of powers argument focuses on the constitutional distinction between the role of Congress in adopting rules of law and the role of the courts in deciding cases in which an existing rule of law is interpreted and applied. In *United States v. Klein*,¹²³ the Supreme Court held that a statute directing it to make a factual finding in a particular case was unconstitutional.¹²⁴ The Court found that the statute "inadvertently passed the limit which separates the legislative from the judicial power"¹²⁵ by "prescrib[ing] a rule for the decision of a case in a certain way"¹²⁶ where "no new circumstances [had] been created by [the] legislation."¹²⁷ The *Klein* doctrine provides that, although Congress can change both substantive and procedural law, it cannot prescribe a rule of decision in a case; that is, Congress cannot tell courts how to apply existing legal rules.

Because *Klein* was decided more than a century ago, and because few cases have involved application of the *Klein* doctrine, it is difficult to draw a bright line separating the legislative from the judicial power. In other words, precisely when is Congress attempting to determine the result in a litigation as opposed to prescribing a new rule of law? Through its decision in *Robertson v. Seattle Audubon Society*,¹²⁸ the Supreme Court recently furnished some guidance. *Seattle Audubon* involved an

applying a different rule of law to similarly situated defendants. This Article will not examine the equal protection challenge to § 27A.

121. Possibly the most troubling aspect of § 27A is subsection (b), which revives cases dismissed on the basis of *Lampf*. In *McCullough v. Virginia*, 172 U.S. 102 (1898), the Supreme Court held that the legislature lacks the power to take away rights that have been vested by final judgment. The Court based this conclusion both on principles of separation of powers and on the rationale that a final judgment is a form of property that cannot be taken away without due process. *See id.* at 123-24. Because subsection (b) allows cases to be reinstated upon motion of the plaintiff, whether or not a final judgment of dismissal has been entered and the time for appeal passed, it interferes with the defendant's vested rights in the final judgment. *See, e.g., Treiber v. Katz*, Fed. Sec. L. Rep. (CCH) ¶ 97,203 (E.D. Mich. June 5, 1992) (upholding § 27A under *Klein* doctrine, but finding statute unconstitutional to the extent that it seeks to reinstate claims that have already been subject to final adjudication).

122. For cases holding that § 27A violates separation of powers, see *Johnston v. CIGNA Corp.*, 789 F. Supp. 1098, 1098 (D. Colo. 1992); *TGX Corp. v. Simmons*, 786 F. Supp. 587, 591 (E.D. La. 1992); *In re Brichard Securities Litig.*, 788 F. Supp. 1098, 1103 (N.D. Cal. 1992).

123. 80 U.S. 128 (1872).

124. *See id.* at 147-48. *Klein* involved a statute that directed courts to treat the fact that individuals had accepted presidential pardons as conclusive proof of their disloyalty for purposes of claims for compensation for property abandoned to federal troops during the Civil War. *See id.* at 142-43. Upon proof of the pardons, the courts were to dismiss summarily for want of jurisdiction. *See id.* at 143-44.

125. *Id.* at 147.

126. *Id.* at 146.

127. *Id.* at 147.

128. 112 S. Ct. 1407 (1992).

attack, under the *Klein* doctrine, on a statute regulating timber harvesting in Washington state.¹²⁹ The Ninth Circuit had concluded that the statute violated the principles inherent in *Klein*.¹³⁰ It held that although Congress could affect pending litigation, even deliberately, by amending or repealing a law, it could not dictate the outcome of a litigation where "no new circumstances have been created by legislation."¹³¹ The Ninth Circuit then interpreted the new statute as directing the court to reach a specific result rather than as establishing new law. Accordingly, it held that the statute violated *Klein*.¹³²

The Supreme Court reversed. The Court did not abandon the *Klein* doctrine but explained that the doctrine did not apply because the statute at issue in *Seattle Audubon* had in fact changed the underlying law.¹³³ The Court interpreted the statute differently from the Ninth Circuit and found that it indirectly amended the environmental statutes in the pending litigation by providing alternative statutory criteria under which timber harvesting was legal.¹³⁴ This was, according to the Court, the equivalent of amending the original statute, something that Congress clearly had the authority to do.¹³⁵ Moreover, Congress was not directing the outcome of a litigation because it still remained for the court to decide whether the timber harvesting satisfied the criteria of the new legislation.¹³⁶ Accordingly, the Court concluded that Congress had "compelled changes in law, not findings or results under old law."¹³⁷

By using the *Klein* criteria to evaluate the legality of the statute at issue in *Seattle Audubon*, the Supreme Court signalled that the *Klein* doctrine was still valid.¹³⁸ Courts evaluating the validity of section 27A under the *Klein* doctrine have therefore asked whether section 27A changes the law of Rule 10b-5 statute of limitations.¹³⁹ Presumably,

129. See *id.* at 1410-12. The statute in *Seattle Audubon* was passed during pending environmental litigation regarding the harvesting of timber in Washington. See *id.* at 1410. The statute changed the criteria under which timber harvesting was legal not by amending the environmental law under which the litigation was pending, but by adding new methods of complying with the old statute. See *id.* at 1410-11. The statute also expressly referred to the pending litigation by caption and docket number and indicated that adherence to the statute's new criteria would be sufficient to satisfy the statutory requirements that were the basis of the litigation. See *id.* at 1411.

130. See *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1315 (9th Cir. 1990).

131. *Id.* (quoting *United States v. Klein*, 80 U.S. 128, 147 (1871)).

132. See *id.* at 1317.

133. See *Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407, 1413-14 (1992).

134. See *id.*

135. See *id.* at 1414.

136. See *id.* at 1413-14.

137. *Id.* at 1413.

138. The Supreme Court also indicated the continued vitality of the *Klein* doctrine in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). Again the Court did not invalidate the statute in question but claimed that its holding was "consistent with the principles articulated in *Klein*." *Id.* at 402.

139. The question is whether Congress is changing the law or attempting to overturn a judicial interpretation of an unchanged law. For a recent case in which the court considered this question, see *Johnston v. Cigna Corp.*, 789 F. Supp. 1098 (D. Colo. 1992).

Congress had the authority to adopt a statute of limitations different from that adopted by the Supreme Court in *Lampf*, and adoption of a new statute of limitations would constitute the necessary change of law to satisfy *Klein*.¹⁴⁰

Section 27A does not, however, change the statute of limitations applicable to 10b-5 cases. Indeed, by enacting section 27A instead of the broader provisions that had been considered, Congress accepted the *Lampf* limitations period for all cases except those subject to section 27A. Congress therefore did not reverse *Lampf* by statute; it simply reversed the retroactive application of *Lampf*.

Many courts have concluded that section 27A nonetheless changes the applicable law.¹⁴¹ These courts have reasoned that Congress simply changed the statute of limitations, and hence the applicable law, for a small class of cases: those filed in a timely manner prior to *Lampf*. Thus, for example, the Tenth Circuit in *Anixter v. Home-Stake Production Co.*,¹⁴² explained that "in Section 27A, Congress prescribed a new statute of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991."¹⁴³

The problem with this analysis is that Congress did not change the law even for this narrow class of cases. Congress did not, as the *Anixter* court states, prescribe a new statute of limitations at all. Congress simply rejected the retroactive application of *Lampf* to pending cases and, in so doing, returned the courts to their conflicting and confusing variety of pre-*Lampf* limitations periods.

It can be argued that section 27A is an example of a negative rather than an affirmative method of adopting a law. In other words, Congress' action in enacting section 27A can be described as the adoption of a new rule of law that is not a specific limitations period, but rather a rejection of the *Lampf* limitations period. Thus Congress, for the class of cases specified by section 27A, has adopted the rule of "not-*Lampf*."

Again, however, this mischaracterizes the nature of the statute. Section 27A does not simply reverse *Lampf*; it "turns back the legal clock to the period just prior to *Lampf*."¹⁴⁴ Such a congressional action might be valid if the statute then allowed the courts "independently to adjudicate

140. The general issue of whether the judiciary or the legislature has the power to impose changes in the law retroactively is beyond the scope of this Article. For a discussion of this issue, see *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2448 (1991). This Article will not address the hoary issues posed if Congress passed a new statute of limitations and applied it retroactively to pending cases.

141. See *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 806 F. Supp. 108 (N.D. Tex. 1992) (citing cases).

142. 977 F.2d 1533 (10th Cir. 1992).

143. *Id.* at 1545; see also *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1573 (11th Cir. 1992) (concluding that § 27A "amends the Securities Exchange Act to provide the statute of limitations for private causes of action under section 10(b) that were filed by June 19, 1991").

144. *Adler v. Berg Harmon Assocs.*, 790 F. Supp. 1235, 1243 (S.D.N.Y. 1992).

any reopened actions on the basis of the law as they determine it then existed."¹⁴⁵ Instead, however, the statute orders the judicial clock stopped as of June 19, 1991, preventing the courts from carrying out their judicial function of determining the appropriate statute of limitations in favor of wooden application of the pre-*Lampf* rules. Thus in *Henderson v. Scientific-Atlanta, Inc.*,¹⁴⁶ defendant Scientific-Atlanta asked the court to adopt a one-and-three year limitations period, consistent with *Lampf*, based on the existing law on June 19, 1991.¹⁴⁷ The court refused, stating that such action was foreclosed by section 27A.¹⁴⁸

Even if section 27A simply reversed *Lampf*, it would appear to violate separation of powers principles. As the Supreme Court has stated, "[t]he essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches."¹⁴⁹ It is difficult to see how the Supreme Court could function as a coequal branch with Congress if Congress could simply, by statute, declare that "the decision of the U.S. Supreme Court in *Lampf v. Gilbertson* is hereby reversed."¹⁵⁰ With respect to cases filed prior to June 19, 1991, that is the effect of section 27A.¹⁵¹

145. *Id.*

146. 971 F.2d 1567 (11th Cir. 1992).

147. *See id.* at 1571 (citing Appellee's Brief at 16). The defendant argued that "[n]othing in Section [27A] precludes this Court from determining what the appropriate limitations period was for Section 10(b) in light of all the law that existed on June 19 and applying that law to plaintiffs." *Id.*

148. *See id.* It is as if Congress has said to the courts: "You have been deciding cases in which you develop the law of federal securities fraud under section 10(b) for the last 50 years. With respect to the issue of statute of limitations, you are prohibited from continuing that development within the statutorily-designated set of cases."

149. *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61 (1982) (Burger, C.J., concurring) (citations omitted).

150. *See* 137 Cong. Rec. H11,812-13 (daily ed. Nov. 26, 1991) (statement of Rep. Markey) ("The language contained in [§ 27A] will directly reverse an egregious Supreme Court decision . . .").

With respect to the litigants in *Lampf*, this is exactly what § 27A did. After litigating the statute of limitations issue before the Supreme Court and winning, and after successfully persuading the Supreme Court to apply its decision retroactively to dismiss the claims against them, the *Lampf* defendants then had those claims reinstated against them pursuant to § 27A. *See Gilbertson v. Leasing Consultants Assocs.*, No. 8601369-RE (D. Or. Feb. 6, 1992). Thus, with respect to these litigants, Congress acted as a "Super-Supreme Court." Ironically, it is not clear that Congress intended this result. *See* 137 Cong. Rec. S17,382-83 (daily ed. Nov. 21, 1991) (inquiry by Sen. Garn expressing his understanding that the bill was not intended to affect the parties in the *Lampf* decision itself, and statement by Sen. Riegle confirming correctness of that understanding). *But see* 137 Cong. Rec. H11,812-13 (daily ed. Nov. 26, 1991) (statement of Rep. Markey) (stating that the statute would "apply directly to the case and parties of *Lampf* versus *Gilbertson* itself").

151. Alternatively, the statute can be read as changing the *Lampf* holding from retroactive to prospective. It does not seem as if such legislation constitutes the adoption of new law. *See TGX Corp. v. Simmons*, 786 F. Supp. 587, 592-94 (E.D. La. 1992) (holding that retroactive application of *Lampf* is constitutionally compelled, based on Court's

V. THE FUTURE OF THE RULE 10b-5 STATUTE OF LIMITATIONS

Whatever the answer to the foregoing constitutional debate, section 27A has raised a host of questions.¹⁵² Significantly, it is probably not the last congressional word on Rule 10b-5 statute of limitations. Several members of Congress have already expressed their intention to propose legislation lengthening the statute of limitations for securities fraud claims.¹⁵³ In evaluating whether further legislation is desirable, several factors are worth further consideration.

First, in discussing the *Lampf* decision and limitations periods for securities fraud, Congress has given relatively little attention to the rationale behind limitations periods in general. Statutes of limitations serve a number of objectives in our litigation system. They encourage the prompt resolution of claims while evidence is fresh and witnesses are available. They protect putative defendants from having to defend against stale claims and provide repose after a period of time, so that potential defendants need not conduct their affairs indefinitely under a cloud of uncertainty. They protect the judicial system from overload by putting an end to the time when old cases can be brought in favor of preserving resources for fresher claims.¹⁵⁴

In addition to these general factors, there is a further rationale for statutes of limitations in securities cases: they reduce the ability of a potential plaintiff to speculate with a securities fraud claim. As Judge Easterbrook observed in *Short*: "Prices of securities are volatile. If suit may be postponed . . . then investors may gamble with other people's money."¹⁵⁵ An investor can sit on a potential claim for years, waiting to see if the price of the securities involved goes up. If the price goes up, the investor sells. If the price goes down, the investor sues.

This possibility was precisely what caused Congress to adopt relatively

holding in *James Beam*); *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 806 F. Supp. 108 (N.D. Tex. 1992) (same).

152. In addition, the decision and statute continue to raise questions of interpretation. For example, *Lampf* holds that the three year period of repose is not subject to principles of equitable estoppel or tolling. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2782 (1991). Prior to *Lampf*, however, most courts had applied equitable estoppel to toll the borrowed statute of limitations. This equitable tolling doctrine appeared, for purposes of Rule 10b-5 actions, to be a matter of federal rather than state law. Presumably then, it was not part of the statute of limitations that courts borrowed from state law. Was the tolling doctrine then revived by § 27A, or does that aspect of *Lampf* survive?

153. See S. 3181, 102d Cong., 2d Sess., at § 36 (1992) (containing a general statute of limitations requiring all private rights of action, except as provided elsewhere in the statute, to be filed not later than two years of when the fraud is discovered or should have been discovered or five years from the date of the fraud, whichever is earlier).

154. See generally *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1390-92 (7th Cir. 1990) (discussing policies behind statutes of limitations for purpose of determining which limitations period is most appropriate for Rule 10b-5 claims), *cert. denied*, 111 S. Ct. 2887 (1991).

155. *Id.* at 1392.

short limitations periods¹⁵⁶ for the express private rights of action under the federal securities laws.¹⁵⁷ Congress recognized that the federal securities laws were atypical in the possibility they offered for opportunistic claims¹⁵⁸ and drafted the statutes of limitations accordingly.¹⁵⁹ The current Congress should not let a few highly publicized frauds blind it to this concern.

Further attention should also be devoted to the structure of any proposed statute of limitations. The legislation introduced immediately after *Lampf*¹⁶⁰ included the same dual period structure as the statute of limitations adopted in *Lampf*, but both the House and Senate bills would have allowed plaintiffs to bring suits within a specified period following discovery of the fraud, even after the expiration of the longer statutory window.¹⁶¹ This meant that the discovery provision would permit suits as timely even if they were filed more than five years after the date of the fraud, leaving no absolute outside limit or period of repose for securities fraud claims.

In addition, the proposed statutes described the discovery provision of the statute of limitations in terms of "reasonable diligence."¹⁶² That is, the proposed legislation provided for the discovery provision to run from the date that the fraud was discovered or should have been discovered through the exercise of reasonable diligence. Although some statutes of limitations in the federal securities laws incorporate this approach,¹⁶³ the limitations period adopted by the Supreme Court in *Lampf* did not; the start of the one year time frame was predicated on actual discovery of the

156. See, e.g., 78 Cong. Rec. 8199 (1934) (statement of Sen. Kean) (describing opportunity of investor to speculate with fraud claim: "[The investor] might say to himself, 'I have something that I can sue on if these bonds go down. If they go up I will not want to sue because I will get a profit on them, but should they go down, then I have the option of suing.'").

157. See, e.g., 78 Cong. Rec. 8198 (1934) (statement of Sen. Fletcher):

[T]he thought was that a man ought not to delay suit more than 1 year after he discovers the fraud. If he has been injured and finds that he has been injured, he ought to bring his action within a reasonable time, and we fix that time at 1 year.

158. See 78 Cong. Rec. 8594 (1934) (statement of Sen. Logan) ("[A]s time passes someone reaches the conclusion he has lost money in gambling on the stock market, because generally that is what it is, and he will go back to find out whether there was anything omitted in the statement.").

159. See 78 Cong. Rec. 8201 (1934) (statement of Sen. Barkley) ("I think we have to consider this proposed statute of limitations in a little different light from that in which we consider ordinary statutes of limitations.").

160. Two major legislative proposals, the Bryan bill and the Markey bill, are discussed *supra* in the text accompanying notes 87-94.

161. See Bryan bill, *supra* note 87, § 36; Markey bill, *supra* note 89, § 36. Thus both proposed acts would have allowed suits to be filed within the latter of the two or three year discovery period or the five year straight limitations period.

162. See Bryan bill, *supra* note 87, § 36; Markey bill, *supra* note 89, § 36.

163. See, for example, § 13 of the Securities Act of 1933, which provides for a period running for "one year after the discovery . . . or after such discovery should have been made by the exercise of reasonable diligence. . . ." 15 U.S.C. § 77m (1988).

fraud.¹⁶⁴ Chairman Breeden warned Congress in his comments on the proposed legislation that a "reasonable diligence" approach provides less clarity because of the difficulty in ascertaining whether a plaintiff should have discovered a fraud earlier than he or she actually did.¹⁶⁵ As Chairman Breeden observed, "this requirement would prompt a considerable amount of needless litigation to resolve subtle shadings of what an investor could or might have done."¹⁶⁶

Finally, the debate about statute of limitations is, in part, a microcosm of the larger debate about the efficacy of securities fraud litigation. Studies have shown that securities fraud litigation is peculiarly subject to abuse. For example, a recent study published by Professor Janet Alexander in the *Stanford Law Review*¹⁶⁷ found that a majority of the securities fraud class actions studied settled at roughly twenty-five percent of the amount at stake,¹⁶⁸ seemingly without regard to their relative merit. The study also concluded that the primary beneficiaries in these cases appear to be lawyers, not individual stockholders.¹⁶⁹ A study conducted by the Law and Economics Consulting Group examined 330 cases brought since 1988 and found similar results.¹⁷⁰ Congressional concern over this situation has prompted several legislative proposals to overhaul the litigation of securities fraud cases, the nature of the cause of action, or

164. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2782 (1991). It is not clear that either the Court or Congress has focused on the distinction between the two standards. See *id.* at 2782 n.9 (acknowledging, as SEC observed, that terminology of the one- and three-year periods differed slightly in different sections, and selecting, without analysis, the language of § 9(e) of the 1934 Act, "[t]o the extent that these distinctions in the future might prove significant . . .").

165. See *Securities Investor Legal Rights, Hearing on H.R. 3185 before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 22-25 (1991) (prepared testimony of Chairman Breeden); *Securities Investor Protection Act of 1991, Hearing on S. 1533 before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong., 1st Sess. 28-30 (1991) (prepared testimony of Chairman Breeden); Letter from Richard C. Breeden to Senator Pete Domenici dated Aug. 12, 1992, reprinted in 138 Cong. Rec. at S12,603-04 (daily ed. Aug. 12, 1992) [hereinafter Breeden Letter].

166. Breeden Letter, *supra* note 165, at S12,604.

167. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991).

168. See *id.* at 517. The study constructed a sample of lawsuits and determined the amount at stake by calculating the amount of stock price movement and the number of shares affected by the lawsuit. See *id.* at 515-17.

169. See *id.* at 574-76. Professor Alexander calculated that plaintiffs' attorneys fees and expenses averaged over 25% of the recovery in her sampling of settled cases and estimated that total costs of litigation, involving costs and attorneys fees, "are probably about equal to the amount distributed to the class." *Id.* at 573.

170. See Vincent E. O'Brien, *The Class Action Shakedown Racket*, Wall St. J., Sept. 10, 1991, reprinted in 137 Cong. Rec. at S17,357 (daily ed. Nov. 21, 1991) (finding that 96% of securities fraud cases were settled; average attorneys' awards were about \$1 million in fees and \$250,000 in expenses or 21% of the average settlement amount; settlements resulted in less than a nickel in compensation for each dollar lost by investors); see also William Tucker, *Shakedown?*, Forbes, August 19, 1991, at 98 (securities fraud class actions become a "kind of tax on American businesses").

both.¹⁷¹ If Congress, after fifty years, is finally ready to pay some real attention to the court-created doctrine of federal securities fraud, it would be ironic for its efforts to be limited to section 27A.

171. *See, e.g.*, 138 Cong. Rec. S12,599 (daily ed. Aug. 12, 1992) (introduction by Sen. Domenici of the Securities Private Enforcement Act of 1992, S. 3181, describing it as a "bill to establish a filing deadline and to provide certain safeguards to curb frivolous and other cases not substantially justified which are brought under the Securities and Exchange Act's implied private action provisions"); H.R. 417 (introduced by Rep. Tauzin, Jan. 5, 1993, and described in 25 Sec. Reg. & L. Rep. (BNA) No. 2 at 43-44 (Jan. 15, 1993)) (proposing to reform securities fraud litigation and to extend the statute of limitations to one and five years); *see also* Alexander, *supra* note 167, at 581-96 (discussing possible changes in litigation system to establish a greater link between the merits and the outcome in settled cases).